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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 25

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

MARQUETTE CEMENT MANUFACTURING COMPANY,
Respondent.

PETITION FOR RECONSIDERATION AND FOR A REHEARING.

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TABLE OF CONTENTS.

	PAGE
Powers and Duties of the Federal Trade Commission	1
Things Not Involved	1
Things That Are Involved	1
Misconceptions and Errors	3
Questions to Be Considered	5
The Answers	7
Answer to 1. Jurisdiction	7
Answers 2, 3 and 4	9
Answer to 2. Courts to Act Pursuant to Constitution	11
Answer to 3. Courts May Not Alter "Supreme Law of the Land"	11
Answer to 4. Judicial Powers Exceeded —Legislative Powers Infringed	12
Answer to 5 and 6. Theory of "Acquiescence" Unsound	18
No Factual Basis Exists for Theory of Congressional Acquiescence	19
Enforcement of Sherman Act Prerogative of Executive Department — Danger of Divided Authority Considered	23
1938 Amendment of Trade Commission Act Not Acquiescence	27

PAGE

Answer to 7. Should Every Justice Personally Examine Disputed Documents Upon Which Crucial Point of Jurisdiction Depends? 29

Answer to 8. Rightness of the Opinion Upset by Public Documents 31

Committee Reports Cited in Opinion 40

Congressional History. The Respondent Marquette's Research 50

Effects of the Opinion 52

Many Previous Opinions of This Court Are Overruled 54

Conflicting Procedures Upon Substantially the Same Charges Will Result 55

Trade Commission on Its Own Free of Any Control by the Department of Justice 57

Effect on Robinson-Patman Act Proceedings 60

Public Comments Disagree 64

Economic Effects 65

Application of Sec. 11 and Subsec. 5 (e) 65

Effect of the Time Element 66

The Commission's Order of No Value 68

The Public Interest 69

The Prayer 69

Certificate of Counsel 71

Table of Cases Cited.

PAGE

Allen Bradley Company v. International Brotherhood of Electrical Workers, 325 U. S. 797 (June 18, 1945) 58

Arrow-Hart & H. Electric Company v. Federal Trade Commission, 291 U. S. 587 (March 12, 1934) 59, 60

Baltimore & O. R. R. Co. v. Baugh, 149 U. S. 368, 399, 403 (1893) 18, 52, 57

Corn Products Refining Co., et al. v. Federal Trade Commission, 324 U. S. 726, 736-7 (April 23, 1945) 60

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 69, (1938) 52

Federal Trade Commission v. Bunte Bros., Inc., 312 U. S. 349 (1941) 61

Federal Trade Commission v. Eastman Kodak Co., 274 U. S. 619 (1927) 59, 61

Federal Trade Commission v. Gratz, 253 U. S. 421 (1920) 61

Geddes v. Anaconda Copper Mining Co., 254 U. S. 590 (January 24, 1921) 55

General Electric Co., et al. v. Federal Trade Commission, Nos. 8639, et al. (C.C.A. 7) 63

General Investment Co. v. Lake Shore & Michigan Southern Railway Co., et al., 260 U. S. 261 (November 27, 1922) 55

PAGE

Georgia, Petitioner v. Evans, 316 U. S. 159, 162, 164 (April 27, 1942) 20, 25, 27, 55

Georgia, Complainant v. Pennsylvania Railroad Company, et al., Defendants, 324 U. S. 439, 490 (March 26, 1945) 55

Goodyear Tire and Rubber Company v. Federal Trade Commission, 101 F. 2d 620, 625 61

Humphrey's Extr. v. U. S. (1935) 295 U. S. 602, 625-6 ..... 4, 42

Hunt v. Cromboch, 325 U. S. 821 (June 18, 1945) 58

L. & N. R. Co. v. Sloss-Sheffield S. & I. Co., 269 U. S. 217, 237-8 (1925) 61

Minnesota v. Northern Securities Company, 194 U. S. 48, 70, 71 (1904) 20, 21, 23, 54

National Candy Co. v. Federal Trade Commission, 104 F. (2d) 999 (C.C.A. 7, 1939) 12

New York Life Insurance Co. v. Gamer, 303 U. S. 161, 172 (1938) 19, 52

Northern Securities Co. v. United States, 193 U. S. 197, 400 70

Progressive Miners of America, Local Union No. 109, et al. v. Peabody Coal Co., et al., 75 F. (2d) 460 (C.C.A. 7, Feb. 6, 1935) 55

Sears, Roebuck & Co. v. Federal Trade Commission, 258 Fed. 307 (C.C.A. 7, 1919) 12

PAGE

South Carolina, ex rel. Maybank, Governor, et al., v. South Carolina Electric & Gas Co., 41 F. Supp. 111 (D.C. E.D. South Carolina, 1941).... 55

Swift & Co. v. Federal Trade Commission, 272 U. S. 554, 562 (1926)..... 59

Swift v. Tyson, 16 Pet. 1 (1842).....18, 19, 51, 52

Thatcher Manufacturing Co. v. Federal Trade Commission, 272 U. S. 554, 561..... 59

Triangle Conduit & Cable Co. v. Federal Trade Commission, (C.C.A. 7) Nos. 8639, 8640, 8642, 8644, 8649, decided May 12, 1948..... 63

United States of America v. Cooper Corporation, et al., 312 U. S. 600 (March 31, 1941)..... 55

United States v. Joint Traffic Association, 171 U. S. 505 (1898)..... 12

Wheeler Lumber, Bridge & Supply Co. v. United States, 281 U. S. 572, 578-9 (1930)..... 61

D. R. Wilder Mfg. Co. v. Corn Products Ref. Co., 236 U. S. 165 (Feb. 23, 1915)..... 55

CONSTITUTION OF THE UNITED STATES.

PAGE

Article I—Section 1 9
Section 8 9
Article II—Section 1 9
Section 3 10
Article III—Section 1 ..... 10, 17
Section 2 10
Article VI 10

STATUTES.

An Act to Create a Federal Trade Commission, to Define Its Powers and Duties (Federal Trade Commission Act) (38 Stat. 717; 15 U.S.C.A., Sec. 41) 17
Section 5(e) 5, 53, 65, 68
Section 6(c) 42-3
Section 11 ..... 5, 53, 65
An Act to Promote Export Trade and for Other Purposes (Export Trade Act) 15 U.S.C.A., Sec. 62, 64; 40 Stat. 517 ..... 17-18, 59
An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and for Other Purposes (Clayton Act) (38 Stat. 730; 15 U.S.C.A., Sec. 12) 45
Section 2 ..... 45-6, 60, 63
Section 6 58
Section 7 ..... 45-6, 59
Section 8 45-6
Norris-LaGuardia Act
(29 U.S.C.A., Sec. 101-115; 47 Stat. 70) 18, 58
Sherman Antitrust Act
Sec. 1—15 U.S.C.A., Sec. 1; 26 Stat. 209 3
Sec. 4—15 U.S.C.A., Sec. 26 Stat. 209 .....
17, 19-20, 53

Congressional Record.

PAGE

LI Congressional Record:

Page 11083 33
Page 11104 50
Page 11528 68
Page 12623 ..... 50, 54, 68
Page 12733 54
Page 12734 54
Page 12747 54
Page 12787 ..... 50, 54
Page 12986 68
Page 12988 68
Page 13156 58
Page 14213 46
Page 14251 46
Page 14254 46
Page 14266 48
Page 14267 49
Page 14460 ..... 35, 47, 50
Page 14518 20-24
Page 14519 24-25
Page 14926 ..... 37, 44, 50
Page 14941 50

XXCIII Congressional Record:

Page 3939 28

MISCELLANEOUS.

PAGE

House Report 533 ..... 40, 41

House Report 1142 ..... 40, 43

Senate Report 597 ..... 40, 44

Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives, 5th Congress, 1st Session, H.R. 3143 (Feb. 18-19, 1937) pp. 16-17 27-28

"Mr. Justice Holmes and the Supreme Court," by F. Frankfurter, pp. 25-26 17

Madison's Journal (Journal of the Constitutional Convention, Journal of the Federal Convention Kept by James Madison, Edited by E. H. Scott, Published by Albert Scott & Co. (1893), pp. 398, 400, 402 13-15

Monograph 42. "The Basing-point Problem," by the Federal Trade Commission, printed for use of T.N.E.C. (1941), Marquette's Exhibit 23, p. xii 2

"New Light on the History of the Federal Judiciary Act of 1789," Charles Warren, 37 Harvard Law Review (1923), 49, 51-2, 81, 88, 108 51

"The Nature and Sources of the Law," by John Chipman Gray, Second Edition, pp. 171, 172 ..... 12, 13

"Price Leadership," by George P. Comer, Economic Advisor, Antitrust Division, United States Department of Justice, Volume VII, "Law and Contemporary Problems" by Duke University 65

"Whiffs From Wild Meadows," Sam Walter Foss 52

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PETITION FOR RECONSIDERATION AND FOR A REHEARING.

POWERS AND DUTIES OF THE FEDERAL TRADE COMMISSION.

Things Not Involved.

This petition is not in any way concerned with the legality of any kind of "Pittsburg Plus", "Single, or Multiple Basing Point System", "Delivered prices",

"Phantom-freight", "Freight absorption", "Price discrimination', or of any pricing practices or marketing methods of any kind or nature.[1]

That the Complaint charges a violation of the Sherman Antitrust Act, in both counts, is settled. The Opinion and the holdings therein are based on the assumption "that the conduct charged in each count constitutes a violation of the Sherman Act. "[2] (p. 5.)

Things That Are Involved.

These things are involved: that "The case is concerned wholly with the question of an alleged combination'"[3]; that "The Cement Case of the Commission is the first one in **antitrust enforcement** against a multiple basing-point system," as the Commission proclaimed during the proceeding;[4] and that the Order of injunction (in this proceeding called "an

[1] None of these expressions were involved with the issues in this case save as they were used as epithets to embellish the charge of combination.

[2] The manner in which the assumption is stated "without deciding" gives it a slightly moot flavor, but the conclusion is nevertheless sound because the Court does not entertain and decide moot issues.

[3] Statement of Trial Counsel for the Commission, Mr. Wooden, R. 12,129; Tr. 39,824-5.

[4] The Trade Commission's Monograph 42, "The Basing-point Problem," printed for use of T.N.E.C. (1941), Marquette's Exhibit 23, p. xii.

Order to Cease and Desist") is, as the opinion says, limited by a preamble which directs that all of the Respondents "cease and desist from entering into, continuing, cooperating in or carrying out any * * * agreement, combination or conspiracy, * * *"; so that, "It is thus apparent that the Order by its terms is directed solely at concerted, not individual activity on the part of the Respondents." (Opinion, p. 42) It is these facts that establish that this proceeding is one to prevent and restrain a combination in restraint of trade, prohibited by Section 1 of the Sherman Antitrust Act, (in this proceeding labeled "an unfair method of competition"). These things are involved because they constitute the foundation for the primary question of jurisdiction.

Misconceptions and Errors.

As to the "Powers and Duties" of the Federal Trade Commission, the Opinion has construed the Trade Commission Act directly contrary to the clear intent and purpose of the Act.

The Opinion discloses that this erroneous construction involves certain misconceptions, misapprehensions, oversights and considerable confusion, as hereafter noted.

FIRST: There is a misapprehension of the true nature of the issue of Jurisdiction that was presented to the Court. It is erroneously treated as an inconsequential theory of defense advanced by the Respondent without any sound factual support.

SECOND: There is a misconception of the "judicial Power" invested in the Court and a confusion of "judicial Powers" with "legislative Powers" vested in the Congress.

THIRD: There is confusion between the exercise of powers and duties by the Department of Justice, which is under the control of the President, and the exercise of the same powers and duties by the Trade Commission, which is not at all subject to control by the President but has been held by this court to be completely independent.[*] The opinion also confuses an assignment of powers and duties **by the Congress,** to the Trade Commission, to investigate, to report, and to aid the Department of Justice and the courts, when the Sherman Antitrust Act has been violated, with **a mere assumption by the Trade Commission** of powers and duties to act as a tribunal in Antitrust proceedings, under Section 5 of the Act, though such powers and duties were not assigned to the Commission by the Congress.

FOURTH: There is a misconception as to a theory of a non-existent rule of acquiescence applied to the construction of Section 5 of the Trade Commission Act and in ascribing a meaning to the term "unfair methods of competition."

FIFTH: The Opinion has overlooked and does not give proper consideration to certain important and indispensable matters. These are:

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[*] *Humphrey's Extr.* v. *U. S.*, (1935) 295 U. S. 602, 625-6.

(a) Section 11 and Subsection 5 (e) of the Trade Commission Act.

(b) The pertinent provisions of the Sherman Antitrust Act, the Clayton Act, and the Export Trade Act.

(c) The pertinent Congressional history and background of the over-all statutory plan for the regulation of interstate commerce, which includes the Sherman Antitrust Act, the Clayton Act, the Export Trade Act, and the Federal Trade Commission Act, as separate parts, each with different, but interrelated, functions.

As an aid in clarifying this confusion and as a suggested guide to the correction of the erroneous result, we submit the following questions:

Questions to Be Considered.

1. What is the true nature of the issue of Jurisdiction which was presented to the Court?

2. Is it within the "judicial Power" of any Court to act directly contrary to the "Supreme Law of the Land"?

3. Is it within the "judicial Power" to amend a Law made by the Congress pursuant to the Constitution?

4. Does the Opinion exceed "the judicial Power," and usurp the Legislative Power vested in the Congress?

5. Does repeated exercise of unauthorized powers and duties by an administrative agency amount to such "administrative interpretation" as to modify and broaden the powers and duties defined and limited by the statute under which such administrative agency was created?

6. Will repeated expressions of approval of the exercise of unauthorized power and duties by an administrative agency, under our form of Government, have the effect of giving legality to such actions of an administrative agency:

(a) When such expressions of approval are contained in Opinions wherein the question of such statutory interpretation has not been raised, contested, briefed or argued by the parties?

7. When the Determination of a question of the Jurisdiction of a Tribunal, that has issued the Order under Review, depends upon the Contents of several printed Documents, is it the Duty of each of the Members of the reviewing Court, individually and in person to examine, and to determine for himself the Nature of the Contents of those Documents?

8. Where the rightness of the Opinion of the Court depends upon the contents of specific Public documents which are available to the Court, and there

is a substantial Doubt as to whether or not the Documents so cited actually do support the Statements and Conclusions in the Opinion, is it the Duty of the Court to grant a Rehearing and Reargument on the Point of Jurisdiction?

The Answers.

Answer to 1.
Jurisdiction.

The precise question of Jurisdiction that was presented to this Court was posed by the Petitioner, Federal Trade Commission, in its Brief, as follows:

"Questions Presented."

> "(1) Whether a combination among respondents * * * having the effect and purpose of * * * eliminating price competition among themselves, is an unfair method of competition within the meaning of the Federal Trade Commission Act." (Petitioner, Federal Trade Commission's Brief in the Supreme Court, p. 2.)

The issue was first outlined in the Commission's Petition to this Court for Certiorari:

> "The case is far removed from the usual proceeding under the Federal Trade Commission Act to stop a particular concern from using a trade name or trade practices believed to be misleading or otherwise unfair. The substantive is-

sues are substantially those which arise in an equity proceeding by the United States to enforce the Sherman Act, which issues Congress has deemed to be of such importance that direct appeal should lie to this court." (Statement of the Solicitor General, Petition for Writs of Certiorari filed in this Court in the instant proceeding, pp. 16-17.)

It was later pointed up in the Petitioner Commission's brief as follows:

"Summary of Argument."

"A. It is established that the prohibitions of the Federal Trade Commission Act apply to acts and Practices which violate the Sherman Act, and that a combination among the members of an industry to eliminate price competition among themselves is a price fixing agreement illegal *per se* under the Sherman Act, and, further, that the Federal Trade Commission Act empowers the Commission to prohibit practices which operate to suppress competition." (pp. 29-30.)

"We take it to be almost axiomatic that the Sherman Act renders unlawful combination or agreement among members of an industry to eliminate price competition among themselves, * * *" (p. 39.)

"Combination is thus the focal point of complaint, conclusion and order." (pp. 62-3.)

Thus, the issue of Jurisdiction was presented to this court by the petitioner, Federal Trade Commission.

Respondent, Marquette, contested the issue so presented.

Answers 2, 3 and 4.

The following provisions of the Constitution are pertinent to questions 2, 3, and 4:

Article I:

Section 1:

"All Legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Section 8:

"The Congress shall have Power * * *

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Article II:

Section 1:

"The executive Power shall be vested in a President of the United States of America. * * *"

Section 3:

"* * * He shall take Care that the Laws be faithfully executed, * * *."

Article III:

Section 1:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Section 2:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * * or which shall be made, under their authority; * * *.

"* * * In all other Cases before mentioned the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such exceptions, and under such Regulations as the Congress shall make."

Article VI:

"* * *

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, * * * shall be the supreme law of the Land * * *."

"The Senators and Representatives * * *, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution * * *."

Answer to 2.

Courts to Act Pursuant to Constitution.

That it is not within the "judicial Power" of any Court to act directly contrary to the supreme Law of the Land is not a Subject to be controverted. It follows that it is axiomatic that court Opinions, like the Laws made by the Congress, must be made pursuant to the Constitution.

Answer to 3.

Courts May Not Alter "Supreme Law of the Land."

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby * * *"

and

"All executive and judicial Officers, both of the United States and of the several States shall be bound by Oath or Affirmation to support this Constitution."

Certainly it is not within the judicial Power to amend a Law made by the Congress pursuant to the Constitution.[1]

Answer to 4.

Judicial Powers Exceeded—
Legislative Powers Infringed.

It has been said:

> "Whoever hath an **absolute authority to interpret** any written or spoken laws, it is he who is truly the **Law-giver** to all intents and purposes and not the person who first wrote or spoke them."[2]

Is it strictly true, under the Constitution of the United States of America, as has been said, that:

---

[1] Circuit Courts of Appeal have held that the Trade Commission Act is a "Law made by Congress pursuant to the Constitution." *Sears, Roebuck & Co.* v. *F. T. C.*, 258 Fed. 307, (1919); *National Candy Co.* v. *F. T. C.*, 104 F. (2d) 999, (1939). This Court held the Sherman Act constitutional in 1898. *U. S.* v. *Joint-Traffic Assn.*, 171 U. S. 505.

[2] Benjamin Hoadly, Bishop of Bangor, Sermon Preached Before the King, 1717, p. 12, quoted with words emphasized as above: John Chipman Gray, "The Nature and Sources of the Law," Second Edition, p. 172.

"As between the legislative and judicial organs of a society, it is the judicial which has the last say as to what is and what is not law in a community."[8]

The primary Purpose of the People of the United States in establishing the Constitution was to create a Congress and to vest in the Congress so created all legislative Powers to be exercised by the Government of the United States of America.

The following notes from Madison's Journal throw light upon the conclusions reached by the framers of the Constitution to secure a clean-cut division of powers, between the three departments of the Government. Mr. Madison remarked:

"If it be a fundamental principle of free government that the Legislative, Executive and Judiciary powers should be separately exercised, it is equally so that they be independently exercised.'"

"Mr. Wilson moved * * * 'that the supreme National Judiciary should be associated with the Executive and the revisionary power.' This proposition had been before made and failed;

[8] Ibid, p. 171.

[9] Journal of the Constitutional Convention, Journal of the Federal Convention Kept by James Madison, Edited by E. H. Scott, Published by Albert Scott & Co., 1893 (p. 387).

but he was so confirmed by reflection in the opinion of its utility, that he thought it incumbent on him to make another effort. The judiciary ought to have an opportunity of remonstrating against projected encroachments on the people as well as on themselves. It had been said, that the Judges, as expositors of the law, would have an opportunity of defending their constitutional rights * * * but this power of the Judges did not go far enough.

"Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet may not be so unconstitutional as to justify the Judges in refusing to give them effect. * * *

"Mr. Gorham did not see the advantage of employing the judges in this way. As judges they are not to be presumed to possess any peculiar knowledge of the real policy of public measures. * * * (p. 398)

"Mr. Gerry did not expect to see this point, which had undergone full discussion, again revived. The object he conceived of the revisionary power was merely to secure the Executive Department against legislative encroachment. The Executive, therefore, who will best know, and be ready to defend his rights ought alone to have the defense of them. The motion was liable to strong objection. It was combining and mixing together the Legislative and other departments. It was establishing an improper

coalition between the Executive and the Judiciary Departments. It was making statesmen of the Judges, and setting them up as the guardians of the rights of the people. He relied, for his part, on the Representatives of the people as the guardians of their rights and interests. It was making the expositors of the laws, the legislators, which ought never to be done. (p. 400.)

"Mr. L. Martin considered the association of the Judges with the Executive, as a dangerous innovation; * * * A knowledge of mankind and of legislative affairs, cannot be presumed to belong in a higher decree to the Judges than to the legislature." (p. 402.)

The final decision of the framers of the Constitution was that the Supreme Court, when it should be created by the Congress, would have **no revisionary** power over the Laws made by the Congress. The muniments of this determination are Section 1 of Article I and the second and third paragraphs of Article VI of the Constitution.

By tolerance and because of the great respect and deep-seated reverence for the supreme Court of the United States, it has been generally accepted that "The Constitution is what the supreme Court declares it to be," but what of a situation where the Opinion of the Court purports to "Interpret" an Act of the Congress which has already been declared

Constitutional, and, in so doing, the Opinion by error, or inadvertence, "interprets" or construes the Law in a manner diametrical to the plainly declared and easily ascertainable intent and purpose of the Congress?

The theory that "as between the Legislative and Judicial organs * * * it is the Judicial which has the last say as to what is and what is not law in a community" cannot be supported upon the further theory that there is no provision for reviewing an erroneous or intentionally wrong opinion of the Supreme Court, —i. e., which manifestly transcends the Judicial Powers. Strictly speaking, either there is such a method or one may be provided by the Congress in the exercise of the Powers provided in Article I of the Constitution. In the last analysis, what shall be the law of the Community rests solely within the will of the people.

The truth of the matter is that many things must be done and will be done in the exercise of governmental powers which were not specifically spelled out in the letter of the Constitution nor in the Laws of the United States so far made in pursuant thereof.

Before there was a Supreme Court there was a Congress, and the Constitution made it clearly the duty of the Congress to enact Laws under which the supreme Court and inferior Courts might be created and to devise and enact Laws prescribing the

scheme within which the judicial Power is to be exercised. [10]

Actually the Courts have no authority to alter or amend any law made by Congress. It is not within the judicial Power to make policies. The Court may only void a policy declared in a Law made by the Congress and that only when such Law is not "made pursuant" to the Constitution."[11]

The Opinion in the instant case does go beyond the "judicial Power" which Article III, Section 1, of the Constitution provides, in that it does amend a Law made by the Congress pursuant to the Constitution, namely, "An Act to Create a Federal Trade Commission, to Define its Powers and Duties, and for Other Purposes." (38 Stat. 717, 15 U.S.C.A.; Sec. 41.) It also, without any direct reference thereto, amends, or emasculates, several other Laws made by the Congress pursuant to the Constitution, including Section 4 of the "Sherman Antitrust Act," (26 Stat. 209; 15 U. S. C. A. Section 4), and Sections 2 and 4 of "An Act to promote Export Trade and for

[10] It is the Congress that, acting pursuant to the Constitution, makes the public policy of the Nation into the Law of the Land.

[11] "Justices of the Court are not architects of policy. They can nullify the policy of others; they are incapable of fashioning their own solutions for social problems." (Mr. Justice Holmes and the Supreme Court, by F. Frankfurter, pp. 25-26.)

other Purposes," known as the Export Trade Act (40 Stat. 517; 15 U.S.C.A. Sections 62, 64) and the Norris-LaGuardia Act, 47 Stat. 70; 29 U.S.C.A. Sections 101-115). The actuality of such amendment and emasculation of Congressional Law will become self-evident as the reader peruses this petition.

Answer to 5 and 6.

Theory of "Acquiescence" Unsound.

The basis of the Opinion is first laid upon some doctrine of acquiescence, for no one would assert that the question posed by the petitioner as Point 1 in its brief was raised, briefed, argued, or was a contested issue actually decided in any of the opinions of this Court enumerated in the Opinion. (Op. pp. 5, 6.)

The truth is that there is no substance whatsoever in any such doctrine. The suggestion of such a rule is not new. It has been more frequently attempted since, in exigencies of war, administrative agencies and tribunals increased like guinea pigs.

It should have been laid to rest in 1892 when Mr. Justice Field wrote his brilliant dissent in *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368, 399, protesting against the majority opinion wherein Mr. Justice Brewer continued to follow the 50 year old opinion of Mr. Justice Story in **Swift v. Tyson.** Mr. Justice Field said:

> "Acquiescence in or silence under unauthorized power can never give legality to its exercise under our form of government." (p. 399)

> "Many will doubt the wisdom of a system which permits such a vast difference in the administration of justice for injuries like those in this case, between the Courts of the State and the Courts of the United States." (pp. 400-1)

It seems strange that the mind that conceived the courageous dissent to another opinion where the majority of this Court followed the "The Calf Path" of *Swift* v. *Tyson*[11] should be shocked, as indicated in the opinion in the instant case at the top of page 7, wherein it says,

> "Despite this long and consistent administrative and judicial construction of Section 5, we are urged to hold that these prior interpretations were wrong and that the term 'unfair methods of competition' should not be construed as embracing any conduct within the ambit of the Sherman Act.".

No Factual Basis Exists for Theory of Congressional Acquiescence.

Section 4 of the Sherman Antitrust Act of 1890 provided that:

> "The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of

[11] See dissenting opinion of Mr. Justice Black in *New York Life Insurance Co.* v. *Gamer*, 303 U. S. 161, 172.

the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations." (26 Stat. 209; 15 U.S. C.A. Sec. 4.)

The framers of the Trade Commission Act considered the opinion of this Court in *Minnesota* v. *Northern Securities Company*. In 1942 Mr. Justice Frankfurter, in an Opinion involving the scope of the Sherman Antitrust Act, referred to *Minnesota* v. *Northern Securities Company* (194 U. S. 48) and appended a footnote as follows:

> "In 1914 Congress rejected an amendment to authorize the Attorney General of any State to institute a criminal proceeding, in the name of the United States, to enforce the antitrust laws, 51 Cong. Rec. 14519, 14527." (*Georgia* v. *Evans*, 316 U. S. 159, 162)

We have examined the Congressional Record so referred to and find that the discussion occurred on September 1, 1914, in the Senate, which then had before it both the Clayton Act and the Trade Commission Act. We find that Senator Culberson in stating his opposition to a proposed amendment said:

> "I am opposed to it upon the broad ground that it is best that authority for the enforcement of a general law of the United States should be lodged in the Attorney General and the District Attorneys of the several Districts.

This has been provided for by Section 4 of the Sherman law of 1890, and is brought down in conformity with certain conditions in section 13 of the bill under consideration.

"In 1903 the Supreme Court of the United States, speaking by Mr. Justice Harlan, construed section 4 of the Sherman law both as to its meaning and as to its probable policy. I ask the Secretary to read from that opinion in the case of *Minnesota* v. *Northern Securities Co.* (194 U. S., the marked places at pp. 70 and 71). It expresses my judgment not only with reference to the proper construction of the statute, but the policy upon which it was based and ought to rest.

"The Secretary read as follows:

'The injury on account of which the present suit was brought is at most only remote and indirect: * * * If Minnesota may, by an original suit, in its name, invoke the jurisdiction of the circuit court, * * * every State upon like grounds may maintain, in its name, in a circuit court of the United States, a suit against interstate carriers engaged in business within their respective limits. Further, under that view every individual owner of property in a State may, upon like general grounds, by an original suit, irrespective of any direct or special injury to him, invoke

the original jurisdiction of a circuit court of the United States to restrain and prevent violations of the antitrust act of Congress. We do not think that Congress contemplated any such methods for the enforcement of the antitrust act. We can not suppose it was intended that the enforcement of the act should depend in any degree upon original suits in equity instituted by the States or by individuals to prevent violations of its provisions. On the contrary, taking all the sections of that act together, we think that its intention was to limit direct proceedings in equity to prevent and restrain such violations of the antitrust act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several States and with foreign nations, to those instituted in the name of the United States under the fourth section of the act by district attorneys of the United States, acting under the direction of the Attorney General, thus, securing the enforcement of the act, so far as direct proceedings in equity are concerned, according to some uniform plan, operative throughout the entire country. * * * so far as such commerce is concerned, Congress has prescribed a specific mode for preventing restraints upon it, namely, suits in equity under the direction of the Attorney General. Of the present suit the Attorney

General has no control and is without any responsibility for the manner in which it is conducted, although in its essential features it is just such a suit as would be brought by his direction when proceeding under the fourth section of the antitrust act.'" (p. 14,518)

Thus it appears that the holding of this Court in *Minnesota* v. *Northern Securities Co.* was *actually* before the Congress when it was considering the Federal Trade Commission Act.

Enforcement of Sherman Act Prerogative of Executive Department—Danger of Divided Authority Considered.

The following further colloquy is also pertinent:

"Mr. Colt, * * *

"Mr. President, the question of the enforcement of the antitrust law involves in a larger sense a question of policy. The President of the United States whether a Democrat or a Republican, may have certain views in respect to the enforcement of this law. It may be that the President would like to have the policy of his party carried out with respect to the enforcement of this law. How can that be done if you have 48 attorneys general in the different States charged with the enforcement of this law?

"This amendment will prevent the carrying out of any uniform policy in the enforcement of

the antitrust law, and it can not but lead to confusion; * * *" (p. 14,518)

"Mr. Pomerene: Mr. President, of course the motive back of this amendment is the proper enforcement of the law. I am in entire sympathy with the motive that is behind it. * * *

"What I most fear is the effect of the divided responsibility when it comes to the enforcement of the law. If you are to have one head with his various assistants in the persons of the United States district attorneys, who are responsible to the Department of Justice, it seems to me that we are more likely to have a vigorous enforcement of the law than if we are to say to the State attorney general, 'You may enforce this,' or to the Department of Justice here at Washington, 'You may enforce it.'

"Mr. Reed: Will the Senator pardon me? The law states that the Department of Justice shall enforce it.

"Mr. Pomerene: That is all true.

"Mr. Reed: This is simply giving the privilege to the States.

"Mr. Pomerene: That is all true; but it is also suggested by one of the amendments that the attorneys general of the States may have direct charge of such cases, independent of the Department of Justice here at Washington. That is a part of the vice of this proposition. * * *

"* * * What is going to be the effect of it?

"Mr. Smith of Michigan: It would result in a divided jurisdiction.

"Mr. Pomerene: Undoubtedly; the jurisdiction would be divided; the responsibility would be divided; and, as a result, in my judgment, the law would not be so well enforced as it now is." (p. 14,519)

The amendment was accordingly rejected as Mr. Justice Frankfurter has pointed out.

The Opinion in *Georgia* v. *Evans* above referred to has a direct bearing upon the problem now before the Court in the instant case. The Opinion refers to the *Cooper Corporation Case,* where it says the only question was

"'whether, by the use of the phrase "any person," Congress intended to confer upon the United States the right to maintain an action for treble damages against a violator of the Act.' 312 U. S. 604, 85 L. ed. 1074, 16 S. Ct. 742. Emphasizing that the United States had chosen for itself three potent weapons for enforcing the Act, namely, criminal prosecution under §§ 1, 2, 3, 15 USCA §§ 1-3, injunction under § 4, 15 USCA § 4, and seizure of property under § 6, 15 USCA § 6, the Court concluded that Congress did not also give the United States the remedy of a civil action for damages. This interpretation was drawn from the structure of the Act, its legis-

lative history, the practice under it, and past judicial expressions. It was not held that the word 'person,' abstractly considered, could not include a governmental body. Whether the word "person' or 'corporation' includes a State or the United States depends upon its legislative environment. *Ohio* v. *Helvering,* 292 U. S. 360, 370, 78 L. ed. 1307, 1310, 54 S. Ct. 725. The *Cooper Corp.* Case recognized that 'there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law.' 312 U. S. at 604, 605, 85 L. ed. 1074, 1075, 61 S. Ct. 742. Considering all these factors, the Court found that Congress did not give to the Government, in addition to the other remedies exclusively provided for it, the remedy of treble damages—the only remedy originally given to victims other than the Government of practices proscribed by the Act.

"The considerations which led to this construction are entirely lacking here. The State of Georgia, unlike the United States, cannot prosecute violations of the Sherman Law. Nor can it seize property transported in defiance of it. And an amendment was necessary to permit suit for an injunction by others than the United States.

See *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 70, 71." (*Georgia* v. *Evans*, 316 U. S. 160, 161, 162 (1941).)

1938 Amendment of Trade Commission Act Not Acquiescence.

Congress never knowingly acquiesced in any such "administrative interpretation" as the Opinion refers to. The truth is, the Trade Commission appeared before the committee of the House of Representatives in 1937 to secure the only amendment of the trade commission act ever made. There the commissioners made representations which were the very opposite of its "interpretation". The colloquy was as follows:

> "Commissioner Davis: From time to time our investigations of a subject may lead into a state of facts which we think should be brought to the attention of the Department of Justice as possible violations of the Sherman Act * * *.
>
> "Commissioner Ferguson: Matters where we have exclusive jurisdiction. There are matters over which they have jurisdiction also.
>
> "Commissioner Davis: Let me see if I can make myself clear. Now, you understand the Department of Justice and we both have jurisdiction over certain sections of the Clayton Act. We have exclusive jurisdiction over our act. They have exclusive jurisdiction over the Sherman Act.

"Mr. Mapes: You have joint jurisdiction over the Clayton Act?

"Commissioner Davis: Certain sections of the Clayton Act. Now, there has been absolute harmony between the two departments. We do not, both of us, commence in the same case. * * *

"Mr. Mapes: I think this is true, Judge Davis, that the public perhaps does not distinguish between the jurisdiction of the Federal Trade Commission and the jurisdiction of the Department of Justice." (Hearing before the Committee on Interstate and Foreign Commerce, House of Representatives, 75th Congress, 1st Session, H. R. 3143 (Feb. 18-19, 1937) pp. 16-17.)

A subsequent statement made by Congressman Lea shows that the Congress amended the Trade Commission Act in the light of the assurance thus given by Commissioners Davis and Ferguson as to the distinction between the duties of the Trade Commission and the Attorney General with reference to the administration of the Antitrust laws. Congressman Lea's statement is as follows:

"With reference to the Antitrust laws, the function of the Federal Trade Commission is to investigate the facts and report to the Attorney General. That is different from the duties as to unfair trade practices" (83 Cong. Record, p. 3939).

Answer to 7.

Should Every Justice Personally Examine Disputed Documents Upon Which Crucial Point of Jurisdiction Depends?

It is axiomatic that it is the duty of each member of a reviewing court, individually and in person, to determine for himself, the nature of the contents of documents which vitally affect a primary question of jurisdiction. This is not to deny that there are situations where the Court may appoint a special Master to take and to report evidence, nor to deny that the Court might with propriety arrive at a conclusion without each member of this Court personally inspecting the last detail of every piece of documentary evidence, especially when the contents are not in dispute and when the meaning thereof does not determine a primary controlling issue. However, no such situation as that presented itself to the Court in the instant case.

Here the contents of the documents would determine at the threshold whether or not the entire proceeding was tainted by administrative usurpation of "powers and duties" not conferred by the Congress upon the administrative agency. Here, the Opinion of this Court cites, as support of its conclusions and its holdings on the question of jurisdiction, twenty full pages of the Congressional Record, and other pages of certain Committee Reports. (Opinion, p. 8, footnote 6.)

On the other hand, in the Respondent's Brief (pp. 19 to 78, inclusive), there were presented forty specific references to the Congressional Record with many full quotations from the very same pages of the Congressional Record that are cited in the Opinion. In addition, the same Reports of the Committees of the Congress cited in the Opinion were referred to. **The result is a direct conflict between the statement in the Opinion that the conclusions and holdings of this Court on the point of jurisdiction are supported by these references and the statement by the Respondent that they not only do not support the conclusions and holdings of the Court but they are directly opposed to such conclusions and holdings.** Under such circumstances no Judge would shirk the task of individually and personally examining these records to ascertain for himself wherein lies the truth as to these directly opposite contentions, if there were no better and equally effective method of determining the truth. We think that this essential task can be done effectively without so overburdening the Court. We offer a suggestion in the Prayer.

Answer to 8.

RIGHTNESS of the Opinion Upset by Public Documents.

As prime evidence not only of "a substantial doubt," but that the Congressional Record does not support the Court's conclusions as the Opinion supposes, we respectfully direct this Court's attention to the photographs of three of the pages of the Congressional Record cited and relied upon in the opinion to support the conclusions and holdings on the point of jurisdiction (Op. p. 8, note 6) and also the enlarged photographs of pertinent passages from these pages which are inserted in this Petition. These are offered as **typical examples** of the supporting references in the opinion.

NO INTERFERENCE WITH ATTORNEY GENERAL.

his bill does not interfere with the Attorney General in the inistration of the antitrust law. There has been a great isposition to change in any way the Sherman antitrust law, which the country has confidence, or to change the agency ough which that law is to be administered, so that this bill ves the powers of the Attorney General as complete as ever h reference to the enforcement of the antitrust law. So far my individual opinion is concerned, I would favor an entire ning over of the administration of the antitrust law to this mission, as contributing to greater precision, greater cer- ty, greater consecutiveness in the prosecution of corporate laws; but public sentiment is not yet prepared for that , and so I yield to the judgment of the committee in that ticular.

All the powers of this commission are in aid of the courts d in aid of the Attorney General, and are not intended to erfere with his control over the enforcement of the Sherman . We all know, so far as the courts are concerned, that both Attorney General and the courts have realized that they the administrative machinery and experience necessary to ble them to form proper judgment as to the method of dis- tion and the method of reintegrating the component parts these great industrial combinations. No one can complain

powers with the corporations of the country. It used its powers wisely and discreetly, and usually succeeded in getting all the information that it required. We heard of no abuse of personal rights under that organization, and I take it that the outcry raised against the so-called inquisitorial powers of this commission will be found in practical experience to have been unnecessary.

INVESTIGATION.

The powers to investigate, the powers to call for reports, must be general, and they must be so general as that they can be exercised against every one of perhaps 350,000 State corporations which are engaged in greater or less degree in interstate commerce; but whilst the powers are great, the application of the powers will necessarily be limited. We know that the business and trade corporations of this country are as a rule conducted in conformity with law. We know that the outlaws are few; but we must shape the powers of this commission so that we can reach that outlaw whether it be a corporation with a capital stock of ten million or a hundred million or a billion dollars, or whether it be a corporation with a capital stock of only $100,000; for oftentimes a small corporation may be made the instrumentality through which great monopolistic powers can be exercised. Therefore it will not do to classify in such a way as to eliminate the small corporations, for if you do you may eliminate from the operation of the law the most outrageous outlaws. The powers must be great; the application of the powers will necessarily be limited.

PUBLICITY.

And so as to publicity. The commission is to make public such matters involved in their investigations and reports as they deem advisable, except so far as their information relates to trade processes, names of customers, and things of that kind. They are to have full power of publicity, but it is not to be expected that they will publish everything that comes within their observation. Those matters that are material in the public interest alone will be published, and ought to be published. Here let me say that the sentiment is growing, not only in the country at large but in the legal fraternity itself, that the strict limitations that relate to private business organizations should not be applied to corporations which are public instrumentalities, created by law, artificial beings, owing their life and their existence to the Government itself, and the law of whose life should be exposed to that Government at every step in their procedure.

Mr. President, there are three other provisions in section 3. One relates to the aid which this commission is to give the courts; another to the aid it is to give to the Attorney General in enforcing decrees; another relates to reporting to the Attorney General any infractions of the Sherman antitrust law which come under its observation.

NO INTERFERENCE WITH ATTORNEY GENERAL.

This bill does not interfere with the Attorney General in the administration of the antitrust law. There has been a great indisposition to change in any way the Sherman antitrust law, in which the country has confidence, or to change the agency through which that law is to be administered, so that this bill leaves the powers of the Attorney General as complete as ever with reference to the enforcement of the antitrust law. So far as my individual opinion is concerned, I would favor an entire turning over of the administration of the antitrust law to this commission, as contributing to greater precision, greater certainty, greater consecutiveness in the prosecution of corporate outlaws; but public sentiment is not yet prepared for that step, and so I yield to the judgment of the committee in that particular.

All the powers of this commission are in aid of the courts, subsidiary companies and component parts of these great combinations as to bring them all in harmony with the law. The result has been a serious disappointment on the part of the people of the United States in the results arising from these victories of the Government in its contest with these great combinations.

It is expected that the trade commission will be composed not only of eminent lawyers but of eminent economists, business men of large experience, and publicists, and that their knowledge and information and experience will be of such a varied nature as to make them more competent to deal with the practical question of the dissolution of these combinations than any court or Attorney General could be. It is also expected that as a result of investigation and as the result of long experience they will build up a body of information and of administrative law that will be of service not only to them but to the country itself, and that gradually standards will be established that will be accepted and will constitute our code of business morals.

POWER TO AID THE COURTS.

The power, therefore, is given to this interstate trade commission to act, upon the suggestion of the court, in shaping the decree, making a report as a master in chancery would to the court, and having its recommendations stand the test of the arguments of counsel upon both sides. It is also given the power, after the decree is entered, to investigate as to whether the decree is being carried out, and to make report to the Attorney General. It is also authorized, whenever in its investigations it finds any infraction of the Sherman antitrust law, to report that delinquency, with its findings, to the Attorney General. The power is also given to the commission to inquire into trade practices abroad, and to inquire whether American corporate combinations are joining with foreign producers in an endeavor to control prices.

There has been some difference of opinion, I believe, between Attorneys General as to whether the Sherman antitrust law applies to exports. This bill does not determine that question, but simply gives the commission power to inquire as to whether there is any control effected by American exporters in conjunction with foreign producers with a view to controlling prices, and also the power to inquire into trade practices abroad; and here comes the subject of a very general complaint.

It is contended amongst American exporters that if in their export business they are subject to the Sherman antitrust law, it prevents them from having any understanding with other exporters with reference to the practical conduct of their business abroad with a view to getting a good price for American exports. Their contention is that other countries have not such stringent laws as we have with reference to trusts and monopolies, while England has a common law regarding trusts upon which our Sherman antitrust law is based. England does not endeavor at all to pursue people criminally, but leaves the suit to be prosecuted by individuals instead of by the Government. We all know how ineffective that is. The suit of an individual against a strong combination is the contest of a lilliputian against a giant. So, though the law of England may be the same as our law, there is a difference in the manner and the method of enforcement, and there are understandings between great business concerns there that would invite active prosecution in this country.

EXPORT TRADE.

In Germany, through their cartel arrangements, as they are called, great combinations are organized with a view to controlling prices; and not only combinations, but associations in trade, and so forth. These things are regulated by the Government; but the combination itself is not unlawful. Germany has made great advance on the [illegible]

Mr. WALSH. Mr. President, I want to say a word with reference to that, too. We have given to this Congress, and to the country that is awaiting the passage of this bill, the most solemn assurance over and over again that these remedies are not cumulative to those already provided by the law for violations of the Sherman antitrust law. We have declared that the antitrust acts which Congress is now considering deal with matters which are entirely outside of the Sherman antitrust law and not reached by its provisions at all. When we had the trade commission bill under consideration we were accused time and time again of givng an alternate remedy to the Government in relation to violations of the Sherman antitrust law, and over and over again the assurance was given from this floor that nothing of the kind was contemplated by that legislation at all.

It was said that the Attorney General would have a choice, under the law, whether he should proceed to enforce the Sherman antitrust law in accordance with its original provisions or whether he should hale offenders against that law before the trade commission for the purpose of punishing them as therein provided. We told the Senate again and again that that was not the purpose, that the two were intended to cover practices that were essentially differen' So here, Mr. President, we are endeavoring to pass a law not for the purpose of giving a cumulative remedy for enforcing obedience to the Sherman antitrust law, but we are endeavoring to deal with a situation entirely outside of that law.

... relative to the enforcement of the antitrust law. So far as my individual opinion is concerned, I would favor an entire turning over of the administration of the antitrust law to this commission, as contributing to greater precision, greater certainty, greater consecutiveness in the prosecution of corporate outlaws; but public sentiment is not yet prepared for that step, and so I yield to the judgment of the committee in that particular.

All the powers of this commission are in aid of the courts and in aid of the Attorney General, and are not intended to interfere with his control over the enforcement of the Sherman law. We all know, so far as the courts are concerned, that both the Attorney General and the courts have realized that they lack the administrative machinery and experience necessary to enable them to form proper judgment as to the method of dissolution and the method of reintegrating the component parts of these great industrial combinations. No one can complain of any of the decisions of the Supreme Court upon this subject, with the exception perhaps of the decision in the Knight case. They have uniformly upheld the law and have applied it wherever it ought justly to be applied, but they have not been so successful in the form or the effect of their decrees; and this difficulty arises from the fact that the Attorney General who prosecutes and the judges who sit in judgment belong to the legal profession, and have not, as a rule, experience or training in either economics or industry; and they have been exploring unknown fields when they reached out into the great fields of industry and sought to make such a readjustment of the sub-

... differentiations between great business concerns there that would invite active prosecution in this country.

EXPORT TRADE.

In Germany, through their cartel arrangements, as they are called, great combinations are organized with a view to controlling prices; and not only combinations, but associations in trade, and so forth. These things are regulated by the Government; but the combination itself is not unlawful. Germany has made great advance on the social side of such legislation. The tendencies of England and of America have always been toward intensely individualized action. The tendency of Germany has been toward collective action, embracing something of the character of State socialism. So the things that are under condemnation here are approved by the Government there, but are subject to regulation.

One of the things which the purchasers of American exports do is to combine together to mark down and knock down the price of American exports. They resort to numerous devices on this line, one of them being an association of the buyers operating through one purchaser, who, dealing with a number of American exporters forbidden by law to have concerted action, is, of course, at a great advantage in securing a lower price. So many of our law-abiding American concerns engaged in large operations in the export trade, and perfectly ready to respond to every domestic requirement of the Sherman antitrust law, declare that in their business contests with the world they should not be put in a strait-jacket while the foreign purchasers have unlimited freedom of action.

are not favored, and they must appear almost beyond a reasonable doubt before they can be effective.

I think those words are very material, that they are wholesome, and ought to remain in the bill. What we are trying to do is to condemn monopoly, to condemn practices that lead to it, and the proposition now is to strike out all in relation to monopoly in the section.

Mr. POMERENE. Mr. President——

The PRESIDING OFFICER. Does the Senator from Tennessee yield to the Senator from Ohio.

Mr. SHIELDS. Certainly.

Mr. POMERENE. If the acquisition of the stock is contrary to the inhibition of this section, the result would be the creation of a monopoly. Is not that already provided for in section 2 of the Sherman Act, and therefore if there is no other objection there certainly is no necessity for this provision in the section.

Mr. SHIELDS. Mr. President, that presents a different view of the question. I think there is a necessity for it. The policy of the House in putting section 8 in the bill was in keeping with that outlined by the platforms of the two great political parties, by President Taft in his special message to Congress in December, 1911, after the decision in the cases of the Standard Oil Co. and the American Tobacco Co. It is in keeping with the legislation recommended and advised by President Wilson in his message of last January—that is, the selection of certain specific schemes and devices that are common and ordinary, used by monopolists in forming these combinations, and penalize them. I believe this provision ought to be retained with the criminal penalty. If we strike out all in regard to monopolies in the section, then there is no prohibition of such schemes for the purpose of creating monopoly, and there is no chance hereafter to restore the penal clauses to prohibit the acts therein denounced. Therefore I think these words should not be stricken out.

Mr. CUMMINS. Mr. President, I desire to emphasize the statement made by the Senator from Montana [Mr. WALSH]. It seems to me that we ought not to incur the hazard which we certainly will incur if we leave these words in the paragraph. I think it will have the effect of repealing the antitrust law, so far as monopolies are created through the medium of the holding of stock by one corporation of another. We will have substituted another law for a monopoly so created whenever we pass this statute, and we will have put the enforcement of the law in that respect in the hands of a commission. We will have taken it out of the antitrust law, where it is enforceable through the Attorney General in a civil suit or through a criminal prosecution, and will have put these monopolies so created in the hands of a commission.

While I believe that a commission can perform the most important function in the regulation of commerce, I do not want to give to the commission the enforcement of a statute against a monopoly, for there is no difficulty whatever in perceiving a monopoly and understanding what it is when once the facts are known. Moreover, these words add nothing to the preceding statements in the paragraph. As it is now, I understand, it

Mr. CUMMINS. I know of a great many authorities which hold that if a statute passed to-day is inconsistent with a statute passed 20 years ago the statute adopted to-day governs and repeals entirely or pro tanto the statute of 20 years ago.

Mr. SHIELDS. Certainly; but that is not the proposition. This proposed statute is consistent with the Sherman law.

Mr. CUMMINS. I am asserting that it is inconsistent, in this: That it declares the prohibition, and then says that the prohibition shall be enforced through the Federal trade commission, whereas in the antitrust law a prohibition is declared, and it is to be enforced through the administration of the Department of Justice, either through a civil suit or a criminal suit. Those two statutes are inconsistent with each other.

Mr. SHIELDS. Does the Senator think that providing a cumulative remedy for an existing statute repeals it? I have always thought that it was almost equivalent to a reenactment to provide a new method for the enforcement of a statute, and that is all the trade commission bill does if it does anything.

Mr. CUMMINS. If the Senator assumes that this is a cumulative remedy, then nothing remains to be said, but that is assuming the very proposition in controversy. Is it a cumulative remedy or is it an independent and substituted remedy? This is the view that I have taken of the matter: As it can add no strength to the statute, why should we incur the risk that we must inevitably incur if we pass it in its present form?

Mr. WALSH. Mr. President, I want to say a word with reference to that, too. We have given to this Congress and to the country that is awaiting the passage of this bill, the most solemn assurance over and over again that these remedies are not cumulative to those already provided by the law for violations of the Sherman antitrust law. We have declared that the antitrust acts which Congress is now considering deal with matters which are entirely outside of the Sherman antitrust law and not reached by its provisions at all. When we had the trade commission bill under consideration we were accused time and time again of giving an alternate remedy to the Government in relation to violations of the Sherman antitrust law, and over and over again the assurance was given from this floor that nothing of the kind was contemplated by that legislation at all.

It was said that the Attorney General would have a choice, under the law, whether he should proceed to enforce the Sherman antitrust law in accordance with its original provisions or whether he should hale offenders against that law before the trade commission for the purpose of punishing them as therein provided. We told the Senate again and again that that was not the purpose, that the two were intended to cover practices that were essentially different. So here, Mr. President, we are endeavoring to pass a law not for the purpose of giving a cumulative remedy for enforcing obedience to the Sherman antitrust law, but we are endeavoring to deal with a situation entirely outside of that law.

Mr. WHITE. Mr. President——

The PRESIDING OFFICER. Does the Senator from Montana yield to the Senator from Alabama?

Mr. COVINGTON. Oh, no; I did not say that at all. On the contrary, I think, with all due respect to a certain few people who imagine that most corporations are violators of the law, that the vast majority of them are law-abiding organizations, intending to conform their business practices to the honest methods that the law outlines or fair dealing itself dictates.

The commission is required to make the investigations relating to alleged violations of the antitrust acts as provided in section 10 of the House bill. The original Senate provision of a similar character authorized the commission to go further than to make a report on the facts to the Department of Justice. It provided for a report of the findings of the commission with respect to violations of the law. The purpose of the original House provision was to give some compulsory process whereby the Department of Justice, before bringing suit under the antitrust acts, can obtain all the information necessary to determine whether the law has been violated or not, and for the proper statement of the case of the Government in its bill of complaint if there has been a violation. On the other hand, everyone recognizes that it would be a mistake to divide the authority of enforcement of the antitrust acts between any other body and the Department of Justice. The Attorney General should be left in full control, as the chief law officer of the Government, of the disposition of cases arising under the Sherman law. He could not be thus left if there were embodied in the report of facts made by the trade commission with respect to any investigations conducted by it concerning violations of the Sherman law, findings, that is to say, conclusions of law, respecting violations. The House therefore insisted upon retaining its original language, which has been thought out after consultation with many lawyers actively concerned in the prosecution of trust cases for the Government. The expression "direction of the Attorney General" is eliminated from the section. He is in reality the head of an executive department, and the direction of the President is deemed sufficient. It is a certainty that the President will always direct the commission to make an investigation when his own Attorney General requests him so

business than would have been the requirements of the original section.

Mr. J. M. C. SMITH. Mr. Speaker, will the gentleman yield?

Mr. COVINGTON. Yes.

Mr. J. M. C. SMITH. Has the commission the same authority to compel a copartnership or an individual engaged in an unlawful combination or restraint of trade to make reports as it has of a corporation?

Mr. COVINGTON. It has not the same power to compel reports, because it could not constitutionally do that. I apprehend. It is only by virtue of the visitorial power of Congress over corporations enjoying certain franchise privileges but going beyond the confines of the State that the commission finds its power to compel them to make reports.

Mr. STAFFORD. Mr. Speaker, will the gentleman yield?

Mr. COVINGTON. Yes.

Mr. STAFFORD. The gentleman just stated that it is the rule of the court in interpreting laws to look for the intent of Congress by referring to the reports upon bills. Is not that the rule only where the phraseology is ambiguous, and it does not apply where the language is clear and explicit, as it is in this case, to give power to a Federal commission to extend over all corporations whether large or small?

Mr. COVINGTON. Mr. Speaker, I did not mean to convey the idea that the court in construing an unambiguous section would take either the report on the bill or the legislative debates. What I meant to say to the gentleman from Illinois [Mr. MADDEN] was that the commission itself in trying to find the purpose of the change would see that purpose very clearly indicated by the course of legislative conduct in dealing with the section. That disclosed intent would impel the commission to restrict the scope of the annual report section rather than to broaden it.

Mr. STAFFORD. But there is nothing restrictive in the measure limiting their authority. If they want to exercise it they might exercise it over every corporation.

Mr. COVINGTON. Oh, certainly.

Mr. BATHRICK. Mr. Speaker, will the gentleman yield?

Mr. COVINGTON. Yes.

Mr. BATHRICK. I want to be clear upon this point. No firm or corporation is required to report except those which this commission designates?

Mr. COVINGTON. That is correct.

Mr. BATHRICK. Does the gentleman consider under this bill that the commission will have the power to require a report from a corporation doing business wholly within the State?

Mr. COVINGTON. Certainly not.

Mr. MADDEN. Mr. Speaker, will the gentleman yield again?

Mr. COVINGTON. Certainly.

Mr. MADDEN. In answer to a question that I asked the gentleman a short time ago, the gentleman from Maryland replied that the scope of the commission's authority would be confined to such corporations as were recognized to be violators of the law, or some such expression as that. I do not attempt to use his exact words. Do the conferees undertake to define what classes of corporations are law violators?

Mr. COVINGTON. I think the gentleman from Illinois [Mr. MADDEN] misunderstood me. I meant that the scope of the if there has been a violation. On the other hand everyone recognizes that it would be a mistake to divide the authority of enforcement of the antitrust acts between any other body and the Department of Justice. The Attorney General should be left in full control, as the chief law officer of the Government, of the disposition of cases arising under the Sherman law. He would not be thus left if there were embodied in the report of facts made by the trade commission with respect to any investigations conducted by it concerning violations of the Sherman law, findings, that is to say, conclusions of law, respecting violations. The House therefore insisted upon retaining its original language, which has been thought out after consultation with many lawyers actively concerned in the prosecution of trust cases for the Government. The expression "direction of the Attorney General" is eliminated from the section. He is in reality the head of an executive department, and the direction of the President is deemed sufficient. It is a certainty that the President will always direct the commission to make an investigation when his own Attorney General requests him so to do. And it adds something to that independence and dignity of the commission which is so desirable to have the law creating it free from any suggestion that it is so subordinate a body as to be liable to be directed to do any act by the head of a governmental department.

Mr. BUCHANAN of Illinois. Mr. Speaker, will the gentleman yield?

Mr. COVINGTON. I yield to the gentleman.

Mr. BUCHANAN of Illinois. Does this measure give the commission power to prevent corporations from circulating watered stock?

Mr. COVINGTON. No. That subject is dealt with in another one of the trust bills. I understand—in fact, I know—that the provisions relating to common ownership of stock and interlocking directorates is one of the provisions embodied in the Clayton antitrust bill, now pending in conference.

The powers conferred upon the commission in sections 12 and 13 of the House bill to assist the Department of Justice, upon direction of the courts, in solving the difficult economic problems connected with trust dissolutions under the antitrust law, and upon the initiative of the commission itself to supervise the compliance with decrees of dissolution, are retained in the conference bill in section 6, paragraph (c), and in section 7.

The House bill provided, in section 16, that the commission should have and exercise the same powers conferred upon the Interstate Commerce Commission to subpœna and compel the attendance and testimony of witnesses and the production of documentary evidence and to administer oaths. The Senate bill also contained as its section 8 exactly the same provision. The House managers believed, however, that in line with the policy which caused the recital in full of those powers formerly exercised by the Bureau of Corporations and hereafter to be exercised by the commission, it is both wise and proper that the powers of subpœna and other compulsory process for taking testimony and producing documentary evidence, and the power of enforcing the ordinary processes of the commission with respect thereto in the courts, ought to be set out in full. It is believed that the scope of the present act is such with respect to individuals and corporations engaged in interstate commerce

We offered the photographic examples of pages and excerpts from the Congressional Record, to demonstrate that the citations to the Congressional Record do not support the court's conclusions. We do not think it necessary to cumber the petition with photographs of the seventeen other pages of the Congressional Record. We have carefully re-examined each one of them. There is nothing of importance to add to the excerpts from these same pages that are already set forth in the Respondent's Brief.[13]

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[13] **Pages of Congressional Record Cited in Opinion.**

LI Congressional Record	Pages of Respondent Marquette's Brief
Page 11083	27
Page 11104	27
Page 11528	28-29, 58
Page 11529	29-30
Page 11530	30-31
Page 11532	31
Page 11533	31
Page 12146	31-2, 73
Page 12622	32-3
Page 12623	33-4, 35, 36
Page 12733	36-7
Page 12734	37
Page 12787	38, 39, 40
Page 13311	42-3
Page 13312	43
Page 14251	52
Page 14460	54
Page 14926	46-7
Page 14929	47-8

N.B. Page 11,531 was omitted because it contains nothing bearing on the inquiry.

to give to the commission the enforcement of a statute against a monopoly, for there is no difficulty whatever in perceiving a monopoly and understanding what it is when once the facts are known. Moreover, these words add nothing to the preceding statements in the paragraph. As it is now, I understand, it reads:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce where the effect of such acquisition is to eliminate or substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to create a monopoly of any line of commerce.

Can any Senator here conceive of an instance in which a monopoly is created in which competition is not substantially lessened as between two corporations? Even if it were not in conflict with the antitrust law, it is a reiteration. When you prohibit the substantial lessening of competition by the acquisition of stock, of course you prohibit a monopoly, because monopoly is the suppression of competition. Why, after you have prohibited the lesser thing, do you find it necessary to go forward and prohibit the greater thing? The injunction against the lessening of competition, of course, reaches every case of an alleged monopoly and reaches a great many others. So I hope, for the sake of the integrity of the antitrust law, as well as the proper expression of this proposed law, the last clause may be stricken out.

Mr. SHIELDS. Mr. President——

The PRESIDING OFFICER. Does the Senator from Iowa yield to the Senator from Tennessee?

Mr. CUMMINS. I do.

Mr. SHIELDS. I should like to ask the Senator from Iowa if he knows of any authority holding that a statute can be repealed by implication where the subsequent statute is not repugnant or in conflict with the former one, or, further, that a reiteration of a former statute repeals it?

trust law, but we are endeavoring to deal with a situation entirely outside of that law.

Mr. WHITE. Mr. President——

The PRESIDING OFFICER. Does the Senator from Montana yield to the Senator from Alabama?

Mr. WALSH. If the Senator from Alabama will pardon me until I finish this thought, I shall then be glad to yield to him.

Mr. President, I think the Senator from Tennessee [Mr. SHIELDS] will certainly agree with me that if we should reenact section 2 of the Sherman antitrust law, but put another penalty there, if we should provide, for instance, a fine not exceeding $1,000 or imprisonment for not exceeding six months, to that extent the later law would be a repeal of the former law. The former law provides for a fine not to exceed $5,000 and imprisonment not to exceed one year. We could reenact the substance of the law, but provide a different penalty. Undoubtedly the later law would repeal, to that extent, the former law.

Here, Mr. President, we practically repeat the provisions of the Sherman antitrust law, so far as the creation of a monopoly by the acquisition of the stock of one corporation by another corporation is concerned, and we provide another way for bringing to bar those who shall violate its provisions. It becomes a most serious question as to whether Congress intends that as a cumulative remedy, as an additional method of securing the observance of the provisions of the antitrust law, or whether it is believed that the present provisions are too harsh and they ought to be relieved by substituting this present method of enforcement.

I sincerely trust that that impression shall not get abroad, and I do feel as if there can scarcely be a doubt that that will be the construction that will be given to this provision if we allow this language to stand in the bill, for which, I daresay, no one here upon this floor can give any reason.

Mr. COVINGTON. That is correct.

Mr. BATHRICK. Does the gentleman consider under this bill that the commission will have the power to require a report from a corporation doing business wholly within the State?

Mr. COVINGTON. Certainly not.

Mr. MADDEN. Mr. Speaker, will the gentleman yield again?

Mr. COVINGTON. Certainly.

Mr. MADDEN. In answer to a question that I asked the gentleman a short time ago, the gentleman from Maryland replied that the scope of the commission's authority would be confined to such corporations as were recognized to be violators of the law, or some such expression as that. I do not attempt to use his exact words. Do the conferees undertake to define what classes of corporations are law violators?

Mr. COVINGTON. I think the gentleman from Illinois [Mr. MADDEN] misunderstood me. I meant that the scope of the power in the section requiring reports was intended to be restricted rather than enlarged as the result of the final enactment of that section, and I did not mean to say that the commission's authority over the reports from corporations is to be restricted to those that may be engaged in violating the law.

Mr. MADDEN. I understood the gentleman to say that there was a well-defined class of corporations that were understood to be law violators.

Mr. COVINGTON. Oh, no; I did not say that at all. On the contrary, I think, with all due respect to a certain few people who imagine that most corporations are violators of the law, that the vast majority of them are law-abiding organizations, intending to conform their business practices to the honest methods that the law outlines or fair dealing itself dictates.

The commission is required to make the investigations relating to alleged violations of the antitrust acts as provided in section 10 of the House bill. The original Senate provision of a similar character authorized the commission to go further than to make a report on the facts to the Department of Justice. It provided for a report of the findings of the commission with respect to violations of the law. The purpose of the original House provision was to give some compulsory process whereby the Department of Justice, before bringing suit under the antitrust acts, can obtain all the information necessary to determine whether the law has been violated or not, and for the proper statement of the case of the Government in its bill of complaint in equity. The Senate recedes on this amendment with an amendment which is carried in the conference bill in section 6, paragraph (c), and in section 7.

The House bill provided, in section 16, that the commission should have and exercise the same powers conferred upon the Interstate Commerce Commission to subpœna and compel the attendance and testimony of witnesses and the production of documentary evidence and to administer oaths. The Senate bill also contained as its section 8 exactly the same provision. The House managers believed, however, that in line with the policy which caused the recital in full of those powers formerly exercised by the Bureau of Corporations and hereafter to be exercised by the commission, it is both wise and proper that the powers of subpœna and other compulsory process for taking testimony and producing documentary evidence, and the power of enforcing the ordinary processes of the commission with respect thereto in the courts, ought to be set out in full. It is believed that the scope of the present act is such with respect to individuals and corporations engaged in interstate commerce that it ought to contain in its body all of its provisions in full, without having reference to any other existing act to find the extent or application of the law. The Senate accepted this suggestion, and the enactment of those powers by reference to the similar powers possessed by the Interstate Commerce Commission has been abandoned.

The conference bill contains a provision, section 6, paragraph (h), authorizing the commission to investigate from time to time trade conditions in and with foreign countries where the practices of manufacturers, merchants, or traders or other conditions may affect the foreign trade of the United States, and to report to Congress thereon with such recommendations as the commission deems advisable. This section was in the Senate bill substantially in the form in which it now appears. In view of the horrible war now devastating Europe and the nation-wide belief that there is an unusual opportunity for this country to secure and hold the vast export commerce carried on by European countries with South America, there can hardly be a doubt that careful inquiries by a great administrative body, possessed of the experts necessary to make valuable trade investigations, are desirable to secure information and suggest methods by which our industrial business concerns shall rapidly be enabled to expand their export trade until they have the bulk of the great South American commerce.

Mr. SHERLEY. Will the gentleman yield?

Mr. COVINGTON. Certainly.

Committee Reports Cited in Opinion.

The court cites and relies upon three committee reports, H.R. 533, H.R. 1142 and Sen. 597. H.R. 533 is a report of the House Committee on the trade commission bill introduced in April 1914 by Congressman Covington and which passed the House on June 5. In the Senate it was assigned to a committee on interstate commerce. That committee substituted a different bill which added a new section on "unfair methods of competition" (See Resp. Brief p. 25). Senate Report No. 597 is a report on the substitute bill.

We had examined both of these purely preliminary reports. In fact we had quoted a brief passage from page 10 of the Sen. Rep. 597 (See Resp. Brief p. 26) but since these reports were tentative only, we did not think it proper to burden this court with long references that would necessarily be decisive of nothing.

However, since the court in its opinion has seen fit to cite these two reports in support of its conclusion and holding that the trade commission does have the power and duty to proceed against violations of the Sherman Act as "unfair methods of competition", we have gone back to the original source and restudied both of these reports.

Perhaps we should have included the House Report in our references. H.R. No. 533 reported a Bill to create an administrative body.

The Opinion refers only to pages 1 and 6. Page 1 is purely introductory.

The Committee Report at page 2 (to which the Opinion does not refer) recites that "powers of regulation or control of prices, or the power directly to issue orders controlling the lawful operations of industrial business in this country, has no place in the bill now reported." Beginning at the bottom of page 5 is a passage concerned with investigations which the Commission is to make at the direction of Congress, which recites that while "the Supreme Court has held that 'Congress may not delegate its purely legislative power to a Commission,'" it may, "by a commission elicit information" useful for effective regulation of commerce. Also on page 6 there is reference to allowing the proposed Commission to act as a "Master in Chancery" in assisting in drafting decrees after the Department of Justice has completed a trial in a Federal Court on a charge of violation of the Antitrust Act.

Page 7 of the opinion and supporting footnote 5, indicate that this Court has confused the Congressional intent to create a commission that would act purely as an aid to the Department of Justice and the courts in the enforcement of the Sherman Anti-

trust Act, with the Trade Commission's contention in the instant case that it was the intention of the Congress to assign to the Trade Commission the duty and power to proceed against combinations in restraint of trade.

The duty and powers assigned to the Commission to investigate and report, and to assist in drafting decrees, and the like, are strictly those of an administrative agency. In the exercise of such powers, certainly the commission could not assume the right to make or to declare any policy. The power to direct and control when, if at all, where, and how proceedings should be instituted and carried on to prevent and restrain violations of the Sherman Antitrust Act, had been assigned by Congress to the Department of Justice. The Department of Justice is a branch of the Executive Department of the government completely in the control and direction of the President. The Trade Commission, on the contrary, is not such a branch of the Executive Department, and it has been declared by this court to be completely free and independent of control and direction by the President. (*Humphrey's Executor* v. *U. S.*, 295 U. S. 602, 625, 626.)

Among the duties of investigating and reporting assigned to the Commission, there is but a single instance where it may act upon its own initiative. That is provided in Section 6 (c) of the Act whereby the Commission may, after a final decree has been entered in any suit brought by the Department of

Justice "to prevent and restrain any violation of the Anti-Trust acts", make an investigation of the manner in which the decree has been carried out. Even in such a case the Act provides that the Commission "shall transmit to the Attorney General a report embodying its findings and recommendations." If it be true, as this court has said in its opinion, that the duties and powers of the Trade Commission are to proceed against violation of the Anti-Trust acts as "unfair methods of competition", then the provisions of Section 6 (c) of the Act are entirely inconsistent with the provisions of Section 5 of the Act as now "judicially construed".

House Report No. 1142 is a Report of the Conference Committee on the final form of the Trade Commission Act presented for final consideration. It is important. This Report was quite fully covered in Respondent's Brief beginning on page 43 through part of page 46. Committee Chairman Covington's Report to the House on this Conference Bill is especially important. He is explaining the Conference Bill containing a provision new to the House, Section 5, prohibiting "unfair methods of competition." He told the members of the House that as the House Manager on the Conference Committee he succeeded in preserving in the Bill the original purpose of the House,—namely, that the **"Attorney General should be left in full control, as the chief law officer of the Government, of the disposition of cases arising under the Sherman law."** He said, **"Everyone recognizes**

that it would be a mistake to divide the authority of enforcement of the Antitrust Acts between any other body and the Department of Justice." (Cong. Rec. LI, p. 14926.)

Senate Report 597, the last document cited in support of the Court's conclusions, we did not consider of sufficient importance to justify much space in the Respondent's Brief. We quoted from page 10 what we believed to be the only passage of interest in the Report (Resp. Brief p. 26). However, since the Court cited it as support for its conclusion that the Congress did intend that the Trade Commission and the Courts both should be vested with power to prevent and restrain violations of the Sherman Antitrust Act, we have gone back to original sources and given very careful restudy of the entire Report and have found no reason to change our first conclusion.

The question is this: Does "Report Number 597" support the conclusions and holdings on the point of jurisdiction set forth in the opinion?

It is plain to be seen that the Senate Report No. 597 is merely a history of legislation previously considered so that members of the Senate may have before them the evolution of the measures and consult the records referred to at any stage of the proceedings (pp. 13, 14).

It begins with "The Taft Administration" and then takes up "The Cummins Report" of various

bills proposed and the voluminous report thereon during that administration. Then it advances to the following subjects:

> "President Wilson's Administration" "Tentative Bills" and finally to the latest bills proposed and introduced by Congressmen Clayton and Covington and by Senator Newlands.

The entire report concerns itself only with the tentative proposals. It does not reflect in any sense any final conclusions, proposals or intentions concerning the bill finally adopted and reported upon by the Conference Committee of the Senate and the House. Such support, if any, as there is in the Senate report for any conclusions stated in the Opinion, must be found in the section on Page 13 under the title "Unfair Competition" and particularly in the last sentence that "It would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices such as local price cutting, interlocking directorates and holding companies intended to restrain substantial competition." All of these items so specifically mentioned were subsequently covered in the act entitled

> "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for Other Purposes." (The Clayton Act.)

The Clayton Act specifically covered "price cutting" in Section 2, "interlocking directorates" in Section 8, and "holding companies" in Section 7 (38

Stat. 730-732; 15 U.S.C.A. Sections 13, 19 and 18). These provisions of the Clayton Act were very definitely not considered "Unfair Competition". As Senator Cummins pointed out in the debates on the concurrently pending Clayton bill, "I think no one contends that the things here sought to be prohibited are examples of unfair competition; * * * Interlocking directors and the holding of the stock of one corporation by a rival do not constitute unfair competition; they constitute the suppression of competition." (51 Cong. Rec. 14254, a page which was not cited in the opinion.)

These debates on the Clayton bill, occurring in August 1914, before final passage of the Trade Commission Act on September 8, confirm the limited field of action open to the Commission under Section 5 of the Trade Commission Act as follows:

> "Mr. Shields: The jurisdiction of the Commission is confined to 'unfair' competition between dealers. * * * It has no power to restrain or prohibit restraints of trade and monopolies * * *; this was conceded in the discussion of the bill in this Chamber." (51 Cong. Rec. 14,213, not cited in the Opinion)
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> "Mr. Cummins: The purpose of Section 5 in the Trade Commission bill is to bring about a cessation of unfair competition in the beginning before it ripens into monopoly." (51 Cong. Rec. 14,251)

It should mean much to this Court that a Senator, already widely known as an unusually able lawyer in 1914, and whose ability was recognized in 1933, by the new President of the United States, by an expressed desire to make him Attorney General of the United States, Senator Thomas Walsh of Montana, immediately after the foregoing statements were uttered by Senators Shields and Cummins, summed up the clear intention of the Congress that the Trade Commission was to be limited to dealing with "cases that could not be reached by the Sherman Act." **There is simply no support for the assertion in the Opinion, that the Sherman Act and the Trade Commission Act were intended to provide the Government with cumulative remedies against restraints of trade.** (Op. p. 9.) Senator Walsh in concluding his clear and forceful statement said,

> "We told the Senate again and again that was not the purpose, that the two were intended to cover practices that were essentially different" (Cong. Rec., Vol. LI, p. 14,460, a page that is cited in the Opinion to support the very opposite conclusion).

Senator Walsh's statement is so vitally important that we beg the Court to pardon us for repeating that which already appears in the Respondent's Brief, (though it may have been heretofore overlooked), and we ask the indulgence of the court in allowing us to repeat it in full.

"Mr. Walsh: * * * That argument was made when the trade-commission bill was here for consideration, but I do not recall that even the Senator from Missouri (Reed), who, as everybody knows, was exceedingly pronounced in his opposition to section 5, said to the country that we had emasculated the Sherman Antitrust Act by creating the trade commission. (p. 14,266, this page is omitted from references cited in the Opinion)

"Mr. President, it is not my purpose now to endeavor to repeat the absolute demonstration that was made in the course of that debate, that the Sherman Act is left in all its virility applicable to every case to which it has been made applicable in the past or may be by construction made applicable in the future. It was recognized, however, that there were many practices indulged in by business organizations that had not progressed so far in the suppression of competition as to constitute a monopoly, nor so far in the process of combination as to come within the denunciation of the provisions of section 1 of the Sherman Antitrust Act. The trade-commission bill was intended to deal with cases of that character, cases that could not be reached by the Sherman Act. But, Mr. President, in speaking about this matter on yesterday the Senator from Missouri discussed the provisions of sections 2 and 4 (of the Clayton Act) as though the trade commission, under the provisions of those sections, were going to deal with

the occurrences that absolutely constitute the establishment of a combination in restraint of trade or an outrageous monopoly. Those provisions will be taken care of. Why, Mr. President, the Senator went for all his illustrations to cases determined, by the Supreme Court of the United States and the other courts, to be monopolies or combinations denounced by the Sherman Act. Those things will all be open to prosecution under the Sherman Antitrust Act just exactly the same as before. (p. 14,267, a page omitted from references cited in the Opinion)

* * *

"Mr. Walsh. * * * We have given to this Congress, and to the country that is awaiting the passage of the bill, the most solemn assurance over and over again that these remedies are not cumulative to those already provided by the law for violations of the Sherman antitrust law."

"When we had the trade commission bill under consideration we were accused time and time again of giving an alternative remedy to the Government in relation to violations of the Sherman antitrust law, and over and over again the assurance was given from the floor that nothing of the kind was contemplated by that legislation at all."[14]

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[14] This occurred on August 31, 1914, prior to approval by the Senate of the Conference Report on the Federal Trade Commission Act on September 8, 1914.

"It was said that the Attorney General would have a choice, under the law, whether he should proceed to enforce the Sherman antitrust law in accordance with its original provisions or whether he should hale offenders against that law before the trade commission for the purpose of punishing them as therein provided. We told the Senate again and again and again that that was not the purpose, that the two were intended to cover practices that were essentially different." (p. 14,460) (Resp. Brief, pp. 52, 53, 54).[11]

Congressional History.

The Respondent Marquette's Research.

If the work was thorough and if the report is accurate and true, then the weeks of effort which counsel put into the study of the Congressional History of the Federal Trade Commission Act, and of the related Acts which constituted the over-all plan of the Congress for protection of commerce, cannot be over-

[11] Further corroboration of the fact that the Trade Commission Act did not provide a cumulative remedy for enforcement of the Sherman Act will be found in the same volume LI of the Congressional Record at pages: 12623, (Resp. Brief, pp. 33-36); 14926 (Resp. Brief, p. 47); 12787 (Resp. Brief, pp. 38-9); 14941 (not cited in the Opinion) (Resp. Brief, p. 49); 11104 (Resp. Brief, p. 27).

come, though they may be brushed aside, by a mere unsupported, equivocal assertion that:

> "Marquette points to some statements of some of the Act's sponsors, which taken out of their context, might lend faint support to its contention that Congress did not intend the Commission to concern itself with conduct then punishable under the Sherman Act." (Opinion, p. 7)

Though brushed aside or overlooked, the truth will eventually emerge into the light and will correct error. No better demonstration of the truism is to be found than that in the tortuous chronicle of Section 34 of the Judiciary Act of 1789.

It was the thorough research and report on the Congressional History of the first Judiciary Act of the Congress, under which the supreme Court of the United States was organized, including a photographic copy of the original draft of Section 34, that after 134 years brought the truth to light and set the record straight.[16] The grievous error, committed by this Court in 1842,[17] with wicked and wasteful results over a period of 96 years, was corrected by this Court in

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[16] "*New Light on the History of the Federal Judiciary Act of* 1789," Charles Warren, 37 Harvard Law Review (1923), 49, 51-2, 81-88, 108;

[17] *Swift* v. *Tyson*, 16 Pet. 1, (1842);

the able, lucid opinion of Mr. Justice Brandeis."[18] Thus, for nearly a century in the name of *stare decisis* this Court followed "The Calf Path."[19] As the author of that famous doggerel so sapiently said:

> "For men are prone to go it blind,
> Along the calf paths of the mind,
> And thus such reverence is lent
> To well-established precedent."

EFFECTS OF THE OPINION.

The effects of this Opinion, if it be allowed to stand, are now called to the attention of the Court for two purposes:

First, to convince the Court of the error of supposing that the members of the Senate, who had so much to do with the forming of the Trade Commission Act, were entirely oblivious to the serious results that would follow if an administrative agency were to be allowed to usurp the powers and duties of

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[18] *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64 (1938); See also long list of "leading cases" applying the doctrine of *Swift* v. *Tyson* in report of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 69, Footnote 1. Also *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368, 399, (1893) dissenting opinion by Mr. Justice Fields; *New York Life Insurance Co.* v. *Gamer*, 303 U. S. 161, 172 (1938) dissenting opinion by Mr. Justice Black;

[19] "*Whiffs from Wild Meadows*," Sam Walter Foss.

the Department of Justice and the jurisdiction invested in the District Courts of the United States, to prevent and restrain violations of the "Sherman Antitrust Act". The contrary must be presumed. This need not rest entirely upon presumption. If it is not recalled, it will now easily be verified, that on the floor of the Senate when the Trade Commission Act was being discussed, Senator Cummins emphasized that the issues in a Trade Commission proceeding and in a Sherman Act proceeding would be utterly different and that the inquiries would occupy entirely different fields, so that there would be no interference. Furthermore, Senator Newlands specifically referred to the special amendments (which are now the last sentence in subsection 5 (e) and Section 11 of the Act), which he said, when taken together, would prevent any overlapping between the Trade Commission powers and duties with those already provided for the Department of Justice in the Sherman Act.

At this point Senator Sutherland, afterward Mr. Justice Sutherland, supposed a case such as that which actually has now occurred in the cement industry, where an action has been brought by the Trade Commission and another action, duplicating the same charges against the same defendants and seeking substantially the same kind of restraining order as that already issued by the Commission, has been brought by the Department of Justice, pursuant to Section 4 of the Sherman Antitrust Act in

the District Court of Colorado. Thereupon, Senator Cummins, who had been explaining the amendments designed for the specific purpose of preventing duplicate actions by the Trade Commission and the Department of Justice, reassured Mr. Sutherland in words as follows:

> "My first observation is that it is impossible that the case suggested by the Senator from Utah should arise."[20]

Second, for the purpose of illustrating the chaotic results of permitting an administrative agency to make its own law.

Many Previous Opinions of This Court Are Overruled.

Actually, the opinion of the Supreme Court in the *Cement Case* would so amend Section 4 of the Sherman Antitrust Act as to take from the Executive Department of the Government, acting through the Department of Justice, the exclusive right to institute and to control proceedings to prevent and restrain violations of the Sherman Antitrust Act, thus overruling *Minnesota* v. *Northern Securities Company*, 194 U. S. 48, and the cases which have followed it including the following:

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[20] See Resp. Brief pp. 34-39 incl., setting forth quotations from 51 Cong. Rec. at pp. 12,623, 12,733, 12,734, 12,747, 12,787, each of which pages are listed in footnote which is on p. 8 of the Opinion to support opposite conclusions, with the exception of p. 12,747 which is omitted.

D. R. Wilder Mfg. Co. v. *Corn Products Co.*, 236 U. S. 165 (February 23, 1915)

Geddes v. *Anaconda Copper Mining Co.*, 254 U. S. 590 (January 24, 1921)

General Investment Co. v. *Lake Shore & Michigan Southern Railway Co., et al.*, 260 U. S. 261 (November 27, 1922)

United States of America v. *Cooper Corporation, et al.*, 312 U. S. 600 (March 31, 1941)

State of Georgia, Petitioner v. *Hiram W. Evans, John W. Greer, Jr., American Bitumuls Company, et al.*, 316 U. S. 159, 164 (April 20, 1942)

State of Georgia, Complainant v. *Pennsylvania Railroad Company, et al., Defendants*, 324 U. S. 439, 490 (March 26, 1945)

Progressive Miners of America, Local Union No. 109, et al. v. *Peabody Coal Co., et al.*, 75 F. (2d) 460 (C.C.A. 7) (1935)

State of South Carolina, ex rel. Maybank, Governor, et al. v. *South Carolina Electric & Gas Co.*, 41 F. Supp. 111, D.C. E.D. South Carolina (1941).

Conflicting Procedures Upon Substantially the Same Charges Will Result.

Some accused of combinations in restraint of trade may be defendants in an equity proceeding instituted by the Department of Justice in a District Court of the United States where trial before an unbiased tribunal may be secured by challenge of the Judge,

if deemed necessary, where rules of evidence apply, where the presumption of guilt must be overcome by at least a preponderance of the evidence, where the order entered will be called an injunction or restraining order, where appeal directly to the Supreme Court is provided by statute and findings of fact may be reviewed, and a charge of violation of the Order will be tried under a rule to show cause why the accused should not be punished for contempt of Court.

Others accused of the same offense, namely, a combination in restraint of trade, will be named as "respondents" in a Trade Commission Complaint, which will label the alleged combination "An unfair method of competition," and the contested issues of fact and law will be tried before a tribunal which has published its finding of guilty before the Complaint issued, where no right of challenge to secure a trial before an unbiased tribunal is allowed, where the rules of evidence need not be observed as in a Court, where the accused may be found guilty under findings of fact made and tried by his accuser without the requirement of overcoming any presumption of innocence by a preponderance of the evidence, where the restraining order will be labelled "Order to Cease and Desist," with a right of review only in a Court of Appeals under the restriction that the facts as tried and found by the accuser are "conclusive if supported by evidence", with no definite right of appeal to the Supreme Court but only about

a 5% chance of such an appeal by the allowance of a "petition for certiorari", and where the final order which will be entered by the Court may be punished by contempt proceedings plus a penalty up to $5,000 for each violation.

In still other instances, as in the case of the respondents in the case at bar, the accused will suffer the inequities of the Trade Commission proceeding, and before that is finally disposed of, be compelled to endure the burdens of a duplicate proceeding instituted by the Department of Justice—all, in the end, at public expense.

Here it seems appropriate to quote the timely and fitting words of Mr. Justice Field:

> "I cannot permit myself to believe that any such conclusion, when more fully examined, will ultimately be sustained by this Court. I have an abiding faith that this, like other errors, will, in the end 'die among its worshippers.'" *Baltimore and O. R. Co.* v. *Baugh*, 149 U. S. 368, 403.

Trade Commission on Its Own Free of Any Control By the Department of Justice.

It would permit the Trade Commission under the label of the charge of "unfair methods of competition," on its own initiative, to issue complaints which may charge any violation of any of the several Anti-trust Acts.

The Trade Commission could, at any time, institute, and proceed in, labor cases without any regard to the limitations of Section 6 of the Clayton Act or of the Norris-LaGuardia Act.

Thus without an act of Congress, but by judicial legislation, the hope of Senator Kenyon that the power of the Trade Commission would be extended to labor disputes, will be realized. In August, 1914, when the bill had been reported out and was being discussed on the floor of the Senate in relation to amendments which were intended to avoid the possibility of duplication or overlapping of the duties assigned to the Trade Commission and to the Department of Justice in relation to enforcement of the Sherman Antitrust Act, Senator Kenyon expressed a hope that the power of the Trade Commission would be extended to labor disputes (LI Cong. Rec. 13,156).

As specific examples of what might happen, the trade Commission could have instituted the proceedings, tried the issues and entered orders in such cases as *Allen Bradley Company* v. *International Brotherhood of Electrical Workers*, 325 U. S. 792, and *Hunt* v. *Crombach*, 325 U. S. 821. Incidentally, the Commission might have reached a different conclusion than did Mr. Justice Black in the latter case, and upon review in the Circuit Court of Appeals, neither the Commission's findings of fact nor conclusions of law could have been disturbed.

It emasculates the provisions for exemption from prosecution by the Department of Justice under the Sherman Act of export trade associations, as provided under Section 2 of the Export Trade Act, and permits the Trade Commission to proceed against such associations as "combination in restraint of trade", but labelled "unfair methods of competition", under Section 4 of the Act, which provides that the prohibition against "unfair methods of competition," and the remedies provided for said prohibition contained in the Federal Trade Commission Act, shall be extended to the export trade.

The opinion has effectively overruled the following cases:

Arrow-Hart & H. Electric Company v. *Federal Trade Commission*, 291 U. S. 587 (March 12, 1934);

Thatcher Manufacturing Co. v. *Federal Trade Commission*, 272 U. S. 554, 561;

Swift & Co. v. *Federal Trade Commission*, 272 U. S. 554, 562;

Federal Trade Commission v. *Eastman Kodak Co.*, 274 U. S. 619 (1927).

Instead of ineffectually proceeding under Section 7 of the Clayton Act, as the Commission did in those cases, the Commission hereafter may make the same allegations of fact, but conclude that they constitute **"unfair methods of competition"** prohibited by the Federal Trade Commission Act. Since this court now holds that any conduct tending to restrain trade

is an unfair method of competition, the Commission's finding and injunctive order against the continuance of the merged or combined corporations will be upheld. This necessarily follows despite the court's clear statement in *Arrow-Hart & H. Electric Company* v. *Federal Trade Commission*, 291 U. S. 587 (March 12, 1934), at page 599, "if any remedy for such violation is afforded, the court and not the Federal Trade Commission is the appropriate forum."

Effect on Robinson-Patman Act Proceedings.

The Trade Commission plainly set out in this case by "administrative interpretation," aided by "judicial construction," to amend the Clayton Anti-trust Act in two particulars. First the Trade Commission has inserted in the Robinson-Patman amendment, by "administrative interpretation," its definition of "true price" upon which it based Count II of its Complaint, wherein it asserted,

> "In order to derive the true price, the price actually paid to the carrier for transportation of cement to the buyer must be deducted from the delivered price."

This is the same definition which the Trade Commission unsuccessfully endeavored to persuade the Congress to include in the Robinson-Patman Act in 1936, as noted by this Court in *Corn Products Refining Co . . . F. C.*, 324 U. S. 726, 736-7. The effect of a judicial "approval" of this action of the Trade Commission would be, first, to put this Court on

record that it is proper, within our scheme of Government, that an administrative agency may usurp the powers of Congress in the matter of declaring the public policy and making the law, especially when such action bears the stamp of approval by this Court. This would be directly contrary to the law declared in the following cases:

F. T. C. v. *Gratz,* 253 U. S. 421 (1920);

Goodyear Tire and Rubber Company v. *F. T. C.,* 101 F. 2d 620, 625;

F. T. C. v. *Eastman Kodak Company,* 274 U. S. 619 (1927);

F. T. C. v. *Bunte Bros., Inc.,* 312 U. S. 349 (1941).

It would also appear to be contrary to the judgment of the Congress that refused to adopt this definition of "true price" advocated by the Commission. Furthermore, it would appear to go contrary to other Opinions of this Court that recognize the fact that "price" may be, and in many industries always will be, the cost of a product delivered to the buyer at his destination and that, when a seller chooses to price and sell his product at the buyer's destination, transportation is one of the seller's expenses. *L. & N. R. Co.* v. *Sloss-Sheffield S. & I. Co.,* 269 U. S. 217, 237-8 (1925); *Wheeler Lumber, Bridge & Supply Co.* v. *United States,* 281 U. S. 572, 578-9 (1930). The validity of this interpretation by the Trade Commission is not yet settled. While it seems to have reached the stage of "Judicial approval" in

the present Opinion in the instant case, it was not in issue in the proceedings; wherefore, the "approval" thus far has only the status of "obiter dicta."

It is true that the same kind of "Judicial approval" has been depended upon by the Trade Commission since 1927 to justify its proceedings to enjoin Combinations in restraint of trade prohibited by the Sherman Antitrust Act." It is also true that the *obiter dicta* in the present Opinion in the case at bar has already been acted upon in at least one Court of Ap-

" On November 1, 1947, after the oral argument in this case, in the United States Circuit Court of Appeals for Seventh District, the Trade Commission made an admission which is pertinent to the issue of jurisdiction now before this Court as follows:

> "There is no question that Congress contemplated that the Commission's special province should be to deal with restraints of trade in their incipiency and before they have time to ripen into a full-fledged combination and conspiracy in restraint of trade.
>
> "Congress then thought that the remedies already provided under the Sherman Act were sufficient to deal with monopoly in the flower and that the special need was for an agency to deal with monopoly in the seed. Hence, the Federal Trade Commission and the outlawing of unfair methods of competition. This theory of the Act was judicially confirmed several years before the Courts declared our jurisdiction over combinations and conspiracies in voluntary restraint of trade.
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> • • •

peals' Opinion[22] as if it were "settled law," and it will be in others if the Opinion in the instant case stands. It has misled most of those who have commented publicly upon the decision and leaves the Opinion in a very confused state.

A most important amendment to the Clayton Act that will have been accomplished by "administrative interpretation" plus "judicial approval", if the Opinion in the instant case be not reformed, is to add to Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, a provision that prohibits combinations to discriminate in "mill nets." "An Act to Create a Federal Trade Commission, to Define its Powers and Duties, For Other Purposes," will be amended so as to give the Trade Commission the additional power and duty of restraining such "combination".

"It was not until 1927 that the Supreme Court upheld the Commission's jurisdiction of voluntary combinations to fix prices as being an unfair method of competition under Section 5 of the Federal Trade Commission Act (*Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52)." (Respondent, Federal Trade Commission's Brief filed November 1, 1947, in C.C.A. 7, *General Electric Co., et al.* v. *Federal Trade Commission*, Nos. 8639, etc., p. 64.)

[22] *Triangle Conduit & Cable Co., et al.* v. *F. T. C.*, C.C.A. 7, Nos. 8639, 8640, 8642, 8644, 8649, decided May 12, 1948.

Public Comments Disagree.

Scarcely any two of the countless public comments agree upon the interpretation of this Opinion.

Thus far the many published comments on the Opinion have been by news commentators, editorial writers, some lawyers, the Federal Trade Commission, and one Trade Commissioner, individually."

" For example, see Chicago Journal of Commerce, April 27, 1949, "High Court Upholds Federal Trade Commission On Cement 'Fix Charges' "; Wall Street Journal, April 27, 1948, "Supreme Court Rules Cement Company Pricing System is Unfair Competition—Effects Many Basic Industries"; Chicago Daily News, May 4, 1948, "New Rate Mystery", by David Lawrence; Chicago Daily News, May 5, 1948, "Basing Point Pricing Threat to Steel Industries"; Construction Digest, May 6, 1948, "Outlawing Basing Point May Boost Cement Prices"; Chicago Evening American, May 8, "Basing Point System Economic Dilemma", by Lewis Haney; Chicago Tribune, May 10, 1948, Investor's Guide, "*Basing Point Pricing,*" The Basing Point Present Method Which The Supreme Court Has Condemned"; The Chicago Sun and Times, May 16, 1948, "See Rails Losers In Base Price Ruling"; Chicago Tribune, May 19, 1948, "Steel Prices May Become Unsettled".

Federal Trade Commission, Releases, May 1, 1948.

Advertising Age May 24, "Delivered Price System Dead Duck", says Lowell Mason, from speech by Federal Trade Commissioner Mason at Harvard University, May 14th.

Economic Effects.

We do not plead the cause of the small manufacturer of cement, the small processors of steel, the small construction contractors and other businesses which support many small communities, many of which may not only be financially disturbed and embarrassed but some of which may be out of business as the ultimate result of this Opinion. Such damage and suffering as may result will be in a good cause, if it serves to awaken the public to the trend before it shall have gone too far in the direction of economic disturbance that may result from exploding the pricing methods that have been the general custom in the heavy-goods industries for the last half century.[24]

Application of Sec. 11 and Subsec. 5 (e).

The true meaning of Section 11 of the Federal Trade Commission Act, taken together with the last sentence of Subsection 5 (e), must be determined in the light of the full truth of what the Congress intended these provisions to mean as shown by the Congressional Record.[25]

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[24] See article "Price Leadership", by George P. Comer, Economic Advisor, Antitrust Division, United States Department of Justice, Volume VII, "Law and Contemporary Problems" by Duke University.

[25] Senate Amendments were to prevent Commission from overlapping Sherman Antitrust Act proceedings. See quotations from LI Cong. Rec. pp. 11528, 11529, 11530, 11532, 11533, 12146, 12622, 12623, 12733, 12734, 12747, 12787, 12804, 12986, 12988, 13153, 13156, 13160, 13301, 13310, 13311, 13312, Resp. Brief pp. 29-43 inclusive.

The final determination of this question depends upon the contents of 40 pages of the Congressional Record recording proceedings most of which occurred near 34 years ago, and other Congressional documents of the same period. Each of these pages contain about 1800 words in fine print. Manifestly, there will be much chaff in this bin. It will be a difficult and time consuming task to winnow it out, but it should most assuredly be done for the sake of accuracy and a correct conclusion. It must be done. It will be done. We have rechecked our work and find it correct. We cannot, under the circumstances ask this Court to accept our assurances as officers of this Court that it is correct, but it will be checked by others and the full truth will eventually be made known. It is better that that should be done by this Court. It is right that the work should be given all the time that is necessary, so that it be full, fair, complete and accurate to the last detail.

Effect of the Time Element.

Some further necessary delay at this stage of the proceeding is as a mustard seed compared to the Sun, if it be necessary in order to make sure that this Court has arrived at the right conclusion firmly based upon the truth.

We regret the circumstance that the Opinion did not issue until almost the very end of April, and that, for the reasons specified in this Respondent's motion for additional time within which to prepare the Petition for Rehearing, including time that necessarily had to be given to the duplicate proceeding

instituted by the Department of Justice in the District Court of Colorado, the time that had to be spent in the careful study of the Opinion and in making a complete study of the Congressional Record and other official documents and other matters over which counsel for this Respondent had no control whatever, delayed this Petition.

We respectfully point out that the Opinion does not offer any quoted passage from the Congressional Record or from any Congressional Report in support of its conclusion and holding. Wherefore, it is difcult to check the accuracy of any such citations and to determine the extent, to which, if at all, they might support the Trade Commission's claim of power and jurisdiction.

We are grateful for the additional time granted to us by the Court. Nevertheless, we regret that this Court saw fit to insist that we should prepare and file this Petition in so short a time. Now we are compelled to ask the Court to overlook and to excuse our clumsiness of style, ineptness of expression and any unintentional roughness of phraseology, and, above all, the length of the Petition. We humbly suggest that all of these many defects would have been improved if we but had the time deliberately to review what we have had to do under high pressure.

The Commission's Order Of No Value.

Will the Department of Justice enforce the Trade Commission Order in the instant case? This is not a mere rhetorical question. May 19, 1948, at a conference invited by the Attorney General of the United States in that office in Washington, D. C., in the presence of this and other counsel for Respondents, Assistant Attorneys General in charge of the "Denver Case", wherein charges of the same combination were made against the Respondents in the instant case, seeking a restraining Order under Section 4 of the Sherman Antitrust Act, stated that the reason why the *"Denver Case"* was instituted and would be pressed to trial unless Respondents agreed to a decree, was that the Trade Commission Order in the instant proceeding "was no good" and it would not be practical to attempt to enforce it. Of course, no final Order in a Trade Commission proceeding, though it charges combination in restraint of trade, may be offered in evidence in a duplicate proceeding brought by the Department of Justice. This is true because of the last sentence in subsection 5(e) of the Trade Commission Act, one of the provisions added by Senators Cummins and Newlands for the express purpose of preventing the Trade Commission from assuming the duty of proceedings to restrain violations of the Sherman Antitrust Act. (Cong. Rec. LI pp. 11528, 12623, 12986, 12988.)

The Public Interest.

Is it in the public interest that the many millions of dollars which this Trade Commission proceeding has already cost the public and the countless man hours lost by witnesses, counsel for the parties, and especially the Courts, be wasted in such useless proceedings merely to satisfy the limitless ambition of an administrative agency to expand its powers and duties?

So unlimited will be the powers of the Trade Commission as broadened by this Opinion, that it may declare that it is an "unfair method of competition" for automobile manufacturers to conform the model of their cars to certain types.

"Great cases like hard cases make bad law."[28] Let this case be an exception.

The Prayer.

The Respondent, Marquette, respectfully petitions this Honorable Court that the Opinion be withdrawn and reconsidered, and that the matter be set down for reargument. That, in the meantime, a special Master be appointed to take evidence and report wherein, if at all, the references to and excerpts from the Congressional Record and other official documents that have been cited to this Court by the Respondent are in any particular false; wherein, if at all, they

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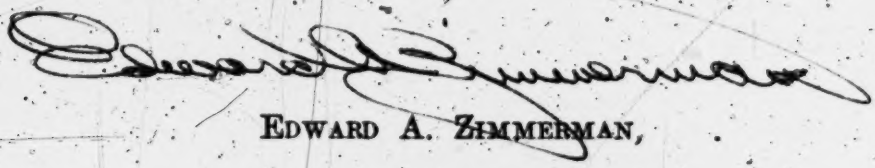
[28] Dissent of Mr. Justice Holmes, *Northern Securities Co. v. U. S.*, 193 U. S. 197, 400.

have been "taken out of their context," so that the effect thereof, falsely or in a misleading manner, "might lend faint support to its contention that Congress did not intend the Commission to concern itself with conduct then punishable under the Sherman Act"; and that the said Special Master be directed to make the same inquiry as to the legislative history contained in each of the several documents cited in the present Opinion or listed in the footnote on Page 8 thereof; and that the Report of said Special Master be returned to the Clerk of this Court and copies thereof served upon counsel for the respective parties within a reasonable time prior to the day set for reargument in this cause, with leave to the respective parties to file their exceptions to said Report, specifying therein in what regard said Report does not truly, fully and accurately report the facts contained in said official records.

To the end that the Court, counsel, the parties and all industry and people who are so vitally concerned in the final Opinion and Order to be entered in this case, including the entire membership of the bar of the nation, may rest secure in the assurance that the truth, and the whole truth, concerning the question of jurisdiction involved herein will be discov-

ered and applied in determining that issue, may this prayer be granted.

Respectfully submitted,



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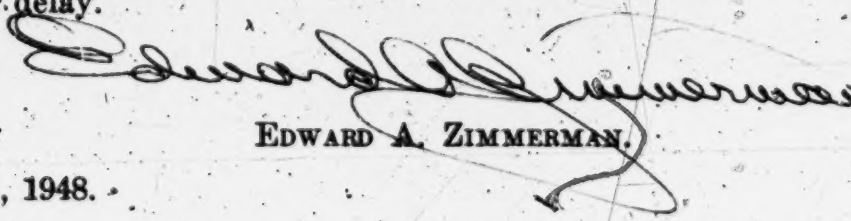
Certificate of Counsel.

I, Edward A. Zimmerman, do hereby certify that I am the attorney for respondent herein and that the foregoing petition is presented in good faith and not for delay.



EDWARD A. ZIMMERMAN.

June 1, 1948.